United States Department of Labor
Employees' Compensation Appeals Board

L.B., Appellant	)	
and	)	**Docket No. 14-463**
	)	**Issued: June 17, 2014**
DEPARTMENT OF THE AIR FORCE, CIVIL ENGINEERING SUPPORT AGENCY, TYNDALL AIR FORCE BASE, FL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Acting Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 23, 2013 appellant filed a timely appeal from an October 23, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying modification of a February 26, 1991 loss of wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether appellant met his burden of proof to establish that the February 26, 1991 loss of wage-earning capacity determination should be modified.

[1] 5 U.S.C. §§ 8101-8193.

[2] The Board notes that, following the issuance of the October 23, 2013 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

On appeal, appellant contends that the evidence of record establishes that he should not work and certainly not in his former job as supervisory equipment specialist due to the nature of the work and travel required. He further contends that OWCP shopped for a second opinion physician and issued a preconceived decision and ignored the statements from the attending neurosurgeons most familiar with his case. Appellant stated that the second opinion physician saw him for only five minutes and his examination consisted of walking on his heels and toes, bending sideways, forward and backwards.

FACTUAL HISTORY

This case was previously before the Board. In a decision dated January 22, 2013, the Board set aside OWCP's February 29, 2012 decision and remanded the case for further development of the medical evidence to determine whether appellant had a change in his employment-related condition that rendered him totally disabled for work.[3] The facts of the case, as set forth in the prior decision, are incorporated by reference.

OWCP referred appellant to Dr. Charles Koulisis, a Board-certified orthopedic surgeon, for a second opinion examination to evaluate the nature of his employment-related condition and the extent and degree of any disability. In a June 17, 2013 report, Dr. Koulisis reviewed appellant's medical history and statement of accepted facts and conducted a physical examination. Appellant had normal cervical lordosis, thoracic kyphosis and lumbar lordosis upon standing. He had a normal gait, was able to heel, toe and tandem walk, do a deep knee bend and arise without difficulty. Appellant had a negative straight leg raise test while sitting and lying and negative provocative testing confined to the sacroiliac joints. Dr. Koulisis concluded that appellant's range of motion was maintained and he was neurologically intact with negative tension signs. He opined that appellant's condition had not worsened and he was not totally disabled. Dr. Koulisis concluded that appellant had reached maximum medical improvement and was capable of light-duty work. On July 18, 2013 he opined that appellant was capable of working as a supervisory equipment specialist with the following restrictions: pushing, pulling and lifting no more than 40 pounds.

Appellant submitted reports dated January 7 through September 25, 2013 from Dr. Mustafa Hammad, a physician Board-certified in clinical neurophysiology, internal medicine, neurology and sleep medicine. Dr. Hammad diagnosed lumbosacral radiculopathy, lumbago, hip pain, leg cramps, lumbar spondylosis, failed back surgery syndrome of the lumbar spine, chronic back pain and chronic pain syndrome. He urged the judicious use of all narcotics taken for pain and advised appellant not to drive or operate heavy machinery while using narcotics. On February 4, 2013 Dr. Hammad diagnosed arthralgia and indicated that appellant had constant lower back pain which was made worse by physical activity, prolonged sitting and standing, whereas it got better by rest, heat, ice and medications. On July 31, 2013 he diagnosed

[3] Docket No. 12-899 (issued January 22, 2013). OWCP accepted that appellant, then a 48-year-old supervisory equipment specialist, sustained a lumbar strain, herniated lumbar disc at L4-S1 and lumbosacral radiculopathy when he slipped, but did not fall, on wet tiles just inside a building entrance in the performance of duty on December 15, 1987. It authorized appropriate compensation benefits and a lumbar laminectomy at L4-S1 which he underwent on December 7, 1988. Subsequently, OWCP approved a lumbar spine fusion which appellant underwent on November 16, 2011.

insomnia/sleeping problems, cancer, back pain, arthritis and lumbar degenerative disc disease. Appellant reported right lower extremity pain coming from his back that was associated with numbness and tingling that he had ever since his first back surgery after an employment injury in December 1987. On August 28, 2013 Dr. Hammad diagnosed esophageal reflux and noted that after appellant's second surgery he had permanent right lower extremity numbness and tingling on the lateral side.

In reports dated April 2 and July 2, 2013, Dr. Mathew McCune, a Board-certified anesthesiologist, diagnosed arthralgia, lumbosacral radiculopathy, hip pain, failed back syndrome, lumbago, spinal stenosis of lumbar, lumbar degenerative disc disease and lumbosacral spondylosis without myelopathy. He indicated that appellant had a dull, achy type of pain in his lower back with occasional sharp, shooting and stabbing pains in his back. The radiation to appellant's lower extremities had improved since his surgery; however, it was still occasionally there. He noticed since the surgery, getting progressively worse, a "crack" in his lower back and that when moving in a direction he could hear a popping sound and then have sharp, stabbing pain in his back. Dr. McCune stated that this was a new type of sensation and wanted to have it investigated.

Appellant also submitted a diagnostic report of the lumbar spine dated July 15, 2013 and physical therapy notes dated March 21, 2012 through August 23, 2013.

By decision dated October 23, 2013, OWCP denied modification of the February 26, 1991 loss of wage-earning capacity determination. It found that appellant failed to submit sufficient evidence to establish any of the three criteria required to modify the loss of wage-earning capacity decision.

LEGAL PRECEDENT

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Section 8115(a) of FECA provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings if his or her actual earnings fairly and reasonably represent his or her wage-earning capacity.[4] Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[5]

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally

[4] *See* 5 U.S.C. § 8115 (determination of loss of wage-earning capacity).

[5] *Id.* at § 8115(a); *see also Katherine T. Kreger*, 55 ECAB 633 (2004); *Loni J. Cleveland*, 52 ECAB 171 (2000).

rehabilitated or the original determination was, in fact, erroneous.[6] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[7]

When a formal loss of wage-earning capacity determination is in place and light duty is withdrawn, the proper standard of review is not whether appellant sustained a recurrence of disability, but whether OWCP should modify its decision according to the established criteria for modifying a formal loss of wage-earning capacity determination.[8] OWCP procedures provide that when the employing establishment has withdrawn a light-duty assignment, which accommodated the claimant's work restrictions and a formal wage-earning capacity decision has been issued, the decision will remain in place, unless one of the three accepted reasons for modification applies.[9]

ANALYSIS

OWCP accepted that appellant sustained a lumbar strain, herniated lumbar disc at L4-S1 and lumbosacral radiculopathy on December 15, 1987. On January 15, 1990 appellant secured a position in the private-sector working as a field engineer, earning $24,400.00 annually. He resigned from his position with the employing establishment effective March 1, 1990. On February 26, 1991 OWCP issued a loss of wage-earning capacity decision, finding that the wages appellant actually earned in the field engineer job was $469.23 weekly, which fairly and reasonably represented his wage-earning capacity. By decision dated October 23, 2013, it affirmed the February 26, 1991 loss of wage-earning capacity decision. The issue is whether appellant established that the February 26, 1991 loss of wage-earning capacity decision should be modified.

Appellant did not establish that OWCP's original loss of wage-earning capacity decision was erroneous or that he had otherwise been retrained or vocationally rehabilitated. Rather he argued a material change in his employment-related condition. The issue is whether the medical evidence establishes a material change in the nature and extent of appellant's employment-related back condition that rendered him totally disabled for work. This is primarily a medical question.[10]

OWCP referred appellant to Dr. Koulisis for a second opinion examination to evaluate the nature of his employment-related condition and the extent and degree of any disability remaining as a result. In a June 17, 2013 report, Dr. Koulisis reviewed appellant's medical history, a statement of accepted facts and conducted a physical examination. Appellant had normal cervical lordosis, thoracic kyphosis and lumbar lordosis upon standing. He had a normal

[6] *See Sharon C. Clement*, 55 ECAB 552 (2004).

[7] *See Tamra McCauley*, 51 ECAB 375, 377 (2000).

[8] *Id.*

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6(a)(5) (June 2013); *T.M.*, Docket No. 08-975 (issued February 6, 2009).

[10] *See F.B.*, Docket No. 10-99 (issued July 21, 2010); *Selden H. Swartz*, 55 ECAB 272 (2004); *Phillip S. Deering*, 47 ECAB 692 (1996).

gait, was able to heel, toe and tandem walk, do a deep knee bend and arise without difficulty. Appellant had a negative straight leg raise test while sitting and lying and negative provocative testing confined to the sacroiliac joints. Dr. Koulisis concluded that appellant's range of motion was maintained and he was neurologically intact with negative tension signs. He opined that appellant's condition had not worsened and he was not totally disabled. Dr. Koulisis concluded that appellant had reached maximum medical improvement and was capable of light-duty work. On July 18, 2013 he opined that appellant was capable of working as a supervisory equipment specialist with the following restrictions: pushing, pulling and lifting no more than 40 pounds.

Dr. Hammad diagnosed lumbosacral radiculopathy, lumbago, hip pain, leg cramps, lumbar spondylosis, failed back surgery syndrome of the lumbar spine, chronic back pain, chronic pain syndrome, arthralgia, insomnia/sleeping problems, cancer, arthritis, esophageal reflux and lumbar degenerative disc disease. On February 4, 2013 he indicated that appellant had constant lower back pain which was made worse by physical activity, prolonged sitting and standing, whereas it got better by rest, heat, ice and medications. On July 31, 2013 appellant reported right lower extremity pain coming from his back that was associated with numbness and tingling that he had ever since his first back surgery after an employment injury in December 1987. On August 28, 2013 Dr. Hammad indicated that, after appellant's second surgery he had permanent right lower extremity numbness and tingling on the lateral side. He urged the judicious use of all narcotics taken for pain and advised appellant not to drive or operate heavy machinery while using narcotics. Dr. Hammad did not explain how appellant sustained a material change in the nature and extent of his employment-related back conditions. His reports fail to provide an opinion on whether appellant was totally disabled due to his accepted employment-related conditions or how his accepted conditions had materially changed. Thus, the Board finds that appellant has not met his burden of proof.

Dr. McCune diagnosed arthralgia, lumbosacral radiculopathy, hip pain, failed back syndrome, lumbago, spinal stenosis of lumbar, lumbar degenerative disc disease and lumbosacral spondylosis without myelopathy. He indicated that appellant had a dull, achy type of pain in his lower back with occasional sharp, shooting and stabbing pains in his back. The radiation to appellant's lower extremities had improved since his surgery; however, it was still occasionally there. Dr. McCune noticed since the surgery and getting progressively worse, a "crack" in his lower back and that when moving in a direction he would hear a popping sound and then have sharp, stabbing pain in his back. Appellant stated that this was a new type of sensation and wanted to have it investigated. Dr. McCune failed to provide sufficient medical rationale to explain the change in appellant's disability status or how his accepted employment-related conditions had materially changed. As such, the Board finds that his reports are insufficient to establish modification of the loss of wage-earning capacity determination.

In support of his claim, appellant submitted a diagnostic report of the lumbar spine dated July 15, 2013 and physical therapy notes dated March 21, 2012 through August 23, 2013. These documents do not constitute competent medical evidence as they do not contain rationale by a

physician as to whether there was a worsening of his accepted conditions.[11] As such, the Board finds that appellant did not meet his burden of proof with these submissions.

The Board finds that appellant has not met any of the requirements for modification of OWCP's February 26, 1991 wage-earning capacity determination. Appellant did not establish that he was retrained or otherwise vocationally rehabilitated or that the original loss of wage-earning capacity determination was erroneous. Furthermore, the medical evidence does not establish a material change in his employment-related conditions. Therefore, appellant failed to establish that the February 26, 1991 loss of wage-earning capacity decision should be modified.

On appeal, appellant contends that the evidence of record indicates that he should not work and certainly not in his former job as supervisory equipment specialist due to the nature of the work and travel required. He further contends that OWCP shopped for a second opinion physician and that Dr. Koulisis saw him for five minutes. The record reflects that Dr. Koulisis's second opinion reports were based on a review of appellant's medical records, medical history and a physical examination. As noted, Dr. Koulisis provided an evaluation of the nature of appellant's accepted employment-related conditions and the extent and degree of any disability remaining as a result. The Board finds that appellant's contentions are not substantiated.

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that the February 26, 1991 loss of wage-earning capacity determination should be modified.

[11] *See* 5 U.S.C. § 8101(2). Section 8101(2) of FECA provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law." *See also Paul Foster*, 56 ECAB 208, 212 n.12 (2004); *Joseph N. Fassi*, 42 ECAB 677 (1991); *Barbara J. Williams*, 40 ECAB 649 (1989).

ORDER

IT IS HEREBY ORDERED THAT the October 23, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 17, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board